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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In Re the Matter of

AMY MARIE VAN HAIL, *Petitioner/Appellee*,

v.

NICHOLAS EVANS, *Respondent/Appellant*.

No. 1 CA-CV 18-0758 FC
FILED 10-29-2019

Appeal from the Superior Court in Maricopa County
No. FC2017-002201
The Honorable Katherine Cooper, Judge

AFFIRMED

COUNSEL

Stewart Law Group, Phoenix
By Brian G. Winter
Counsel for Petitioner/Appellee

Granice Law, PLLC, Scottsdale
By Victor A. Garnice
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

PERKINS, Judge:

¶1 Nicholas Evans (“Husband”) appeals the trial court’s Decree of Dissolution of Marriage dated September 14, 2018 (the “Decree”) on several grounds. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Husband and Amy Van Hail (“Wife”) married in 2007. In 2017, Wife filed a Petition for Dissolution of Marriage (“Petition”) and, after an approximately three-hour trial, the trial court took the matter under advisement and entered the Decree the following month.

¶3 The parties started two businesses during the marriage: Red Dragon Products, LLC (“Red Dragon”) and Midwest Distributions, LLC (“Midwest”). Both businesses sold electronic cigarettes, although Husband testified that Midwest did so on a more limited basis and served primarily as a bank account. While the parties disputed the extent of Wife’s involvement in the businesses, the trial court found that Husband controlled them during the marriage.

¶4 At trial, Wife argued that Husband engaged in waste by destroying Red Dragon and Midwest and funneling customers to his son’s similar businesses in the year preceding the Petition. Husband denied being involved in his son’s businesses and argued that Red Dragon and Midwest had not been successful for several years. Relying primarily on bank statements from Husband’s checking account and the two business accounts for Red Dragon and Midwest, the trial court found that “Husband abandoned the community businesses” and “diverted Red Dragon’s customers to simil[ar] e-cigarette businesses (Cure and Flavora) owned, controlled and/or operated by Husband’s son.” Although Wife testified that Red Dragon and Midwest “made up to \$75,000 per month at times,” the court valued the companies at \$269,700, “the total amount of the deposits to Husband’s checking account” during the year prior to the filing

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of the Petition. The court then awarded Wife half that amount (\$134,850) and awarded what remained of the businesses to Husband.

¶5 Husband also testified that he had not filed tax returns for Red Dragon or Midwest since 2011, and discussed his tentative plans for dealing with the Internal Revenue Service. The trial court held Husband solely liable for all tax debt related to Red Dragon and Midwest.

¶6 The trial court disposed of several properties throughout the dissolution proceedings, two of which are at issue in this appeal. Wife presented evidence that she purchased a condominium (“Glendale Condo”) located at 9020 W. Highland Avenue near Glendale, Arizona during the marriage, which was titled in Wife and her son’s names. Husband testified that Wife purchased this property without his knowledge. Wife testified that she purchased the Glendale Condo with separate funds from a previous marriage. The trial court held that the Glendale Condo was Wife’s separate property because she purchased it “with funds from the sale of a house she owned before the marriage.”

¶7 The parties also purchased ranch property located at 22417 W. Crivello Avenue in Buckeye, Arizona (“West Wind”). Both parties were included on the deed for this property. Husband offered documentary evidence that he purchased and improved West Wind with separate funds which he described as “inheritance” from his father. The parties disputed the nature of the funds used to purchase the West Wind property. Husband acknowledged that Wife also held title to West Wind, and even offered to “buy out” her portion of the property. Because “both parties [held] title to this property which was purchased and improved during the marriage,” the trial court found that West Wind was community property and ordered it to be sold and divided equally between the parties.

¶8 After the trial court resolved several post-decree motions by both parties, Husband timely appealed the Decree.

DISCUSSION

¶9 Husband appeals the Decree on four grounds. He argues the trial court erred by: (1) finding and computing community waste regarding Red Dragon and Midwest; (2) holding Husband solely responsible for tax liability related to Red Dragon and Midwest; (3) characterizing the Glendale Condo as Wife’s sole and separate property; and (4) ordering the forced sale of the West Wind property.

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¶10 We review the trial court's division of property for an abuse of discretion but review *de novo* the trial court's characterization of property as community or separate. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15 (App. 2000). We view the evidence and all reasonable inferences in a light most favorable to upholding the trial court's decree. *Nace v. Nace*, 104 Ariz. 20, 23 (1968).

I. Community Waste

¶11 When determining the equitable division of property in a dissolution proceeding, the trial court may consider and account for any excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition of that property. A.R.S. § 25-318(C). The alleging party has the initial burden to make a *prima facie* showing of waste. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346-47, ¶ 7 (App. 1998). The burden then shifts to the spending spouse to rebut the *prima facie* showing "because all of the evidence relative to the expenditures is generally within the knowledge, possession, and control of the spending spouse." *Id.*

¶12 Here, Wife met her initial burden by presenting evidence that Red Dragon and Midwest generated substantial income in the year preceding the Petition. The trial court made detailed factual findings of substantial deposits and withdrawals from Husband's checking account as well as the two business accounts for Red Dragon and Midwest. *See Gutierrez*, 193 Ariz. at 346, ¶ 6 (finding that alleging spouse met her *prima facie* burden by showing a large withdrawal by spending spouse from a community retirement account). The trial court found this evidence contradicted Husband's claim that Red Dragon had not been profitable for several years.

¶13 Wife also testified that Husband abandoned Red Dragon and diverted its customers to a similar electronic cigarette business owned by Husband's son. Husband denied this allegation. After hearing the testimony and weighing the evidence, the trial court found that Husband abandoned the business and diverted customers to similar businesses owned by his son. We defer to the trial court's weighing of conflicting evidence and determinations of witness credibility. *Id.* at 347, ¶ 13. Reasonable evidence supported the trial court's findings.

¶14 Husband also takes issue with the trial court's waste computation. He argues the trial court abused its discretion by finding the value of Red Dragon and Midwest to be the total amount deposited to

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Husband's checking account in the twelve months leading up to the Petition.

¶15 The trial court noted that Husband failed to disclose his income, and “[n]either party present[ed] documents showing customer lists, sales, or expenses for Red Dragon or Midwest.” Thus, the court concluded “that the parties have failed to present more documentation regarding the earnings from their businesses.” Despite the limited evidence the parties presented, the trial court found multiple transfers between Husband's personal bank accounts and the accounts for Midwest and Red Dragon. The trial court did not abuse its discretion by finding this figure represented “the net profit from Red Dragon and Midwest” during the year preceding the Petition because the trial court had limited evidence at its disposal – in part because of Husband's own behavior in destroying the businesses. *See Hrudka v. Hrudka*, 186 Ariz. 84, 94 (App. 1995) (declining to address spending spouse's argument that estimated waste calculation was inadequate when it was because of spending spouse's “obstructionist behavior that the extent of waste had to be estimated.”), *superseded by statute on other grounds as recognized in Myrick v. Maloney*, 235 Ariz. 491, 494, ¶ 8 (App. 2014).

II. Tax Liability

¶16 In determining the equitable distribution of community property, “the trial court can within its discretion properly allocate payment of the liabilities to one or both parties.” *Spector v. Spector*, 17 Ariz. App. 221, 225 (App. 1972).

¶17 While the trial court properly found that Red Dragon and Midwest were community businesses, it also found that “[d]uring the marriage, Husband controlled the businesses.” At trial, Husband testified that he had not filed taxes for either business since 2011, and briefly discussed his plans for dealing with the IRS. In addition to finding that Husband destroyed the businesses, the trial court awarded what was left of Red Dragon and Midwest after its waste award solely to Husband without offset. The trial court did not abuse its discretion by finding Husband “solely liable for all debts and liabilities, including tax liability” related to Red Dragon and Midwest as part of its overall equitable division of community assets and debts.

III. Glendale Condo

¶18 Property acquired during a marriage is generally presumed to be community property unless it is (1) obtained by gift, devise, or

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descent, or (2) acquired after service of a petition for the dissolution of marriage, legal separation, or annulment and the petition results in a decree. A.R.S. § 25-211(A). A spouse may overcome this presumption by establishing the separate nature of the property by clear and convincing evidence. *Schickner v. Schickner*, 237 Ariz. 194, 199, ¶ 22 (App. 2015).

¶19 Wife and her son purchased the Glendale Condo during the marriage. However, on the record provided, the trial court properly could conclude that Wife successfully rebutted the presumption of community property by showing that she purchased the Glendale Condo solely with separate funds from her previous marriage. *See Nace*, 104 Ariz. at 23 (property purchased during the marriage with funds from separate property remains that spouse's separate property). Moreover, the testimony and evidence showed that Wife and her son – not Husband – held title to the Glendale Condo. Husband did not refute this testimony. The court did not err by finding the Glendale Condo was Wife's separate property.

IV. West Wind Property

¶20 Trial courts have broad discretion to allocate and divide community property, which includes the power to order the sale of community property “when it will facilitate the equitable division of the property.” *Lee v. Lee*, 133 Ariz. 118, 121 (App. 1982).

¶21 Here, the parties purchased the West Wind property during the marriage, and both parties held title. Husband tried to rebut the presumption that West Wind was community property by offering documentary evidence that he purchased it with separate funds from what he described as “inheritance” from his father. The parties disputed the nature of the funds used to purchase the property throughout the trial. Moreover, Husband acknowledged that Wife also held title to West Wind, and even offered to “buy out” her interest in the property. The trial court found West Wind was community property because “[b]oth parties hold title to this property which was purchased and improved during the marriage.” We will not reweigh the evidence and will defer to the trial court's factual findings. *See Gutierrez*, 193 Ariz. at 347, ¶ 13. The trial court did not abuse its discretion by ordering the sale and equal division of the West Wind property.

V. Attorneys' Fees and Costs

¶22 Both parties request an award of attorneys' fees and costs under A.R.S. § 25-324 and ARCAP 21. After considering the reasonableness

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and financial resources of both parties, we award Wife her reasonable fees and costs incurred on appeal, in an amount to be determined after compliance with ARCAP 21, pursuant to A.R.S. § 12-341.01.

CONCLUSION

¶23 We affirm the Decree.



AMY M. WOOD • Clerk of the Court
FILED: JT